**U.S. Department of Labor**

Board of Alien Labor Certification Appeals
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**Issue Date: 08 March 2006**

**BALCA Case No.:** **2005-INA-00156**
ETA Case No.: 2002-CA-09538041/JS

*In the Matter of:*

**WESTERN TEAR-OFF AND DISPOSAL, INC.,**
*Employer,*

*on behalf of*

**RICARDO NEGRETE,**
*Alien.*

Appearances: Peter H. Morgan, Jr.
Pico Rivera, California
*For the Employer and the Alien*

Certifying Officer: Martin Rios
San Francisco, California

Before: **Burke, Chapman and Vittone**[*]
Administrative Law Judges

# DECISION AND ORDER

**PER CURIAM.** This case arises from the Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of alien labor certification for the position of Roofer.[1] The CO denied the application and Employer requested review pursuant to 20 C.F.R. §656.26.

[*] Associate Chief Administrative Law Judge Thomas M. Burke did not participate in this matter.

[1] Permanent alien labor certification is governed by Section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). We base our decision on the record upon which the CO denied certification and Employer's request for review, as contained in the appeal file ("AF") and any written arguments. 20 C.F.R. §656.27(c). This application was filed prior to the effective date of the "PERM" regulations. *See* 69 Fed. Reg. 77326 (Dec. 27, 2004). Accordingly, the

## STATEMENT OF THE CASE

On April 12, 2001, Employer, Western Tear-Off and Disposal, Inc., filed an application for labor certification to enable the Alien, Ricardo Negrete, to fill the position of Roofer. (AF 75). The position required two years of experience in the job offered.

On September 9, 2004, the CO issued a Notice of Findings ("NOF") proposing to deny certification on the basis of the rejection of U.S. workers for other than lawful, job-related reasons and because Employer had failed to establish that there was a job opening for a roofer.[2] (AF 70). The CO observed that Employer was provided five referrals, and that Employer wrote to each applicant by certified mail, requesting that they contact Employer within ten days. All were rejected for failing to contact the Employer. The CO noted that Employer reported that it attempted to contact one applicant by telephone, but got no answer. The CO determined that Employer's contact letter did not identify the specific labor certification position to which the applicants had applied and for this reason, they may not have known that the letters pertained to this specific job. Because of this, the CO found that additional contact attempts would have been prudent.

The CO noted that Employer was stated to be a tear off and disposal company, which may not normally be expected to hire roofers. The CO noted that Employer's contact letter showed that Employer was a tear off and disposal company, whereas the advertisement did not show that the Employer was a tear off and disposal company seeking a roofer. The CO concluded that such circumstances could have added to the difficulty in connecting the contact letter with the advertised job. The CO found that all five applicants' resumes showed at least two years of experience in roofing. Therefore the CO found that the applicants were considered

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regulatory citations in this decision are to the 2004 edition of the Code of Federal Regulations published by the Government Printing Office on behalf of the Office of the Federal Register, National Archives and Record Administration, 20 C.F.R. Part 656 (Revised as of Apr. 1, 2004), unless otherwise noted.

[2] As the latter issue was not one on which the denial of labor certification was based, it will not be detailed herein.

qualified and that Employer did not appear to have made sufficient efforts to recruit them, and had failed to document that these workers were unavailable. Employer was directed to submit rebuttal showing good faith efforts to contact and recruit these U.S. workers.

Employer submitted rebuttal on October 11, 2004. (AF 50). Employer indicated that the majority of its work consisted of removing existing roofing materials; however, it was also in the process of installing new shingles and tile roof, which was the reason for the position at issue. Employer included samples of invoices of work to be performed by it. It also indicated that it failed to understand why the name of the company would be construed to be "Tear Off and Removal only."

With regard to its letter to U.S. applicants, Employer pointed out that the letter indicated the position was "roofer," and therefore, Employer was unable to understand the CO's finding that the applicants would not understand that the letter referred to the job as advertised in the newspaper. As for the five applicants, one, according to Employer, appeared to be qualified. Employer asserted that it made four attempts to contact this applicant by telephone as well as sending the letter, but was unsuccessful. With regard to two other applicants, Employer conceded that they appeared qualified; however, Employer was unable to make contact with them, as was the case with another applicant. According to Employer, the final applicant did not appear to have the two years of experience as required by the ETA 750A. Employer indicated its willingness to retest the labor market. A proposed amendment was provided.

A Final Determination was issued on November 12, 2004. (AF 44). The CO found that Employer's rebuttal was unconvincing in establishing that any additional attempts were made to contact any of the applicants. While Employer claimed that additional telephone calls were made, there was no specific information provided as to when the attempted calls were made or any specific results of these attempts, including whether messages were left. It also appeared to the CO that the one applicant who was found to have less than two years of experience did in

fact have the requisite experience, and Employer had no interview results to contradict this finding. Labor certification, therefore, was denied.

Employer requested review of the denial in a *Brief in Support of Review of Denial* filed on December 9, 2004. (AF 1). This matter was then forwarded to the Board of Alien Labor Certification Appeals ("BALCA" or "Board").

## DISCUSSION

An employer must show that U.S. applicants were rejected solely for lawful job-related reasons. 20 C.F.R. § 656.21(b)(6). Furthermore, the job opportunity must have been open to any qualified U.S. worker. 20 C.F.R. § 656.20(c)(8). Therefore, an employer must take steps to ensure that it has obtained lawful job-related reasons for rejecting U.S. applicants, and not stop short of fully investigating an applicant's qualifications. When presented with seemingly qualified U.S. applicants, therefore, an employer who has a *bona fide* opening it desires to fill would, in exercise of good faith, contact these workers as soon as possible. *M.N. Auto Electric Corp*., 2000-INA-165 (Aug. 8, 2001) (en banc).

In *M.N. Auto Electric Corp.*, the Board observed that "whether the mailing of the letter in and of itself constitutes a reasonable effort to contact a qualified U.S. applicant depends on the facts of the case." The Board also observed that where there are a small number of applicants, sending a letter may not be enough to demonstrate good faith, especially when the employer is provided with telephone numbers to contact applicants. *See, e.g., Diana Mock*, 1988-INA-255 (April 9, 1990); *American Gas & Service Center*, 1998-INA-79 (Jan. 12, 1999); *Sierra Canyon School*, 1990-INA-410 (Jan. 16, 1992). In *M.N. Auto Electric Corp.* the Board also observed that "[t]o document initial or follow-up telephone conversations, an employer must, at a minimum, keep reasonably detailed notes on the conversation (*e.g.,* when the call was made, how long it lasted, whether there was a successful contact with the applicant, the substance of the conversation). Moreover, in *Viva of California*, 1987-INA-583 (Nov. 20, 1987) (en banc), the Board held that an employer does not engage in good faith recruitment where it places the

"burden of follow-up on the applicant instead of 'intensively' recruiting as required by the regulations."

In the instant case, the CO directed Employer to provide documentation of good faith attempts to contact and recruit five apparently qualified U.S. applicants. In rebuttal Employer merely reiterated that four applicants failed to respond to its attempts to contact them, while maintaining that a fifth was not qualified.[3] To the extent that several applicants were rejected for not responding to the Employer's letter, we affirm the CO's finding that Employer failed to establish that this constituted good faith in recruitment. There were only a small number of applicants. Each resume provided a telephone number.

Although the Employer maintained that it attempted to telephone one applicant four times, it provided no documentation to support that assertion.

In regard to the applicant Employer claimed lacked the requisite experience, Employer's rebuttal attempted to establish that the resume actually showed less than two years of total experience. Our review of the resume, however, leads us to conclude that Employer could not have known for certain from the face of the resume that the applicant's roofing experience was less than two years. (see AF 91). Where a U.S. applicant's resume indicates that he meets the broad range of experience, education, and training required for the job, thus raising the reasonable prospect that he meets all of the Employer's stated actual requirements, the Employer has a duty to make a further inquiry, by interview or other means, into whether the applicant meets all of the actual requirements. *Gorchev & Gorchev Graphic Design*, 1989-INA-118 (Nov. 29, 1990) (en banc). Therefore, absent information to the contrary, Employer's stated reason for rejecting this applicant is not a valid, lawful, job-related reason for his rejection.

[3] In its Brief, Employer provides additional details regarding its attempts to contact the U.S. applicants. Our review, however, is to be based on the record upon which the denial of labor certification was made, the request for review, and any statement of position or legal briefs. 20 C.F.R. §656.27(c). *See also* 20 C.F.R. §656.26(b)(4). Thus, evidence first submitted with the request for review will not be considered by the Board. *Import S.H.K. Enterprises, Inc.,* 1988-INA-52 (Feb. 21, 1989) (*en banc*). Furthermore, where an argument made after the FD is tantamount to an untimely attempt to rebut the NOF, the Board will not consider that argument. *Huron Aviation*, 1988-INA-431 (July 27, 1989).

Based on the foregoing, we find that the CO properly denied labor certification in this matter.

## ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

Entered at the direction of the panel by:

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Todd R. Smyth
Secretary to the Board of
Alien Labor Certification Appeals

**NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW:** This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, NW Suite 400
Washington, DC 20001-8002

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.